

(2003) 05 MP CK 0073
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5019 of 2001

Mukesh Kumar Jain

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-05-2003

Acts Referred:

Adjudication Proceedings and Appeal Rules, 1974 — Rule 3
Foreign Exchange Regulation Act, 1973 — Section 33, 34, 36, 37, 38

Citation : (2003) 3 MPLJ 568 : (2004) 55 SCL 387

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : Neeraj Vegad, for the Appellant; Sandeep Aole, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.

Petitioner is assailing continuance seizure of the documents pursuance to the order dated 18-8-1999 P/1 passed by the Assistant Director, Enforcement Directorate under the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA").

Petitioner was arrested on 15-1-1999 and remained in jail custody till 17-3-1999 and was released under the provisions of Section 167(2) of the Criminal Procedure Code. During this time he was interrogated by the Enforcement Directorate, Government of India under the FERA. The statement of the petitioner was recorded and he was again arrested on 16-8-1999. Respondent No. 1 Government of India has issued order of detention dated 26-7-1999 under the provision of Section 3(1) of Conservation of Foreign Currency and Prevention of Smuggling Activities Act, 1974. His detention was quashed by the Advisory Board. He was released on 26-10-1999, The documents which were seized continued to be retained by the Assistant Director, Enforcement Directorate. Petitioner submits that the maximum period provided u/s 41 of FERA is six

months, if proceedings does not commence u/s 51. Detention is illegal and without authority. It is averred that in memo P/1 it was mentioned that from personal search of the petitioner on 15-1-1999 recovery and seizure of US \$ 19,500, Maruti Van and Rs. 400 was made. The foreign exchange of US \$ 19,500 and Rs. 400 and other seized material and the records of the case were taken over by the Enforcement Directorate on 2-2-1999 u/s 38 of the Foreign Exchange Regulation Act, 1973. The petitioner appears to have contravened provisions of Section 8(1) of the FERA and has rendered himself liable to be prosecuted u/s 50 of the FERA. Petitioner was required to show-cause in writing in 30 days as to why adjudication proceedings as contemplated u/s 51 should not be held and US \$ 19,500 and Rs. 400 seized be not confiscated to the Government Account u/s 63 of the FERA. Attention was also invited to the provision of Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 whereby personal hearing of the case could be waived at his request. Notice P/2 was issued to the petitioner informing of the adjudication proceedings in respect of show-cause notice dated 18-8-1999. The Assistant Director, Enforcement Directorate is of the opinion that the adjudication proceedings as contemplated u/s 51 of FERA should be held against the petitioner in accordance with the procedure laid down in Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 and fixed the case for personal hearing on 19-7-2001. Another notice P/8 was sent to the petitioner of hearing on 3-8-2001. It appears that the petitioner did not attend and sent the application P/9 for grant of one month time. Petitioner has submitted that since the proceedings have not commenced u/s 51 within six months from the date of seizure and Section 41 authorizes detention of the documents for six months only, thus continuous detention of the documents is illegal and unauthorized. Process of extension of time is quasi judicial and cannot be exercised unilaterally.

2A. A return has been filed by the respondents that seizure is u/s 38 of the FERA. Show-cause notice u/s 50 of FREA has been issued. Petitioner has given the voluntary statement. He was not threatened. u/s 38 documents can be retained beyond six months. It is contended that provisions of Section 41 of the FREA are not applicable. CJM Jabalpur had directed the petitioner to remain present in the Enforcement Directorate, Agra in connection with investigation. Petitioner never appeared in the office of Enforcement Directorate, Agra in spite of the Court order. There is no illegality in detention order and the proceedings which have been initiated.

Learned counsel for the petitioner has submitted that continuous retention of the documents is bad in law and in violation of Section 41 of FERA. Proceedings were not commenced within six months. Hence, documents be directed to be released. His alternative submission is that proceedings cannot be kept pending for long time, thus, documents be directed to be returned.

Shri Sandeep Aole, learned counsel appearing for the respondents has submitted that seizure is u/s 38 as such limitation prescribed u/s 41 is not applicable and petitioner is not participating in the proceedings, thus, is at fault in not attending

the proceedings. There is no illegality in continued retention of the documents. Hence, writ petition deserves dismissal.

The first submission of learned counsel for the petitioner is that continued seizure is in contravention of Section 41 of the Act. Hence, same deserves to be quashed. Section 41 of the FERA deals with custody of the documents which have been furnished or seized in pursuance of an order made under Sub-section (2) of Section 33 or provision of Section 34, or Section 36 or Section 37 or a requisition or summons u/s 39 or Section 40, any document is furnished is seized and any officer of Enforcement has reason to believe that the said document would be evidence of the contravention of any of the provisions of this Act or any rule, direction or order made thereunder, and that it would be necessary to retain the document in his custody, he may so retain the said document for a period not exceeding six months of it, before the expiry of the said period of six months any proceedings u/s 51 have been commenced, until the disposal of those proceedings, including the proceedings, if any before the appellate Board and the High Court or u/s 56 have been commenced before a court, until the document has been filed in the Court. Seizure, in the instant case is not in pursuance of an order under Sections 33, 34, 36 or 37 u/s 39 or 40. Seizure is u/s 38. Thus, limitation as prescribed u/s 41 is not applicable when the seizure is u/s 38 which nowhere contemplates the period during which custody of the seized article as relevant or useful for investigation or inquiry can be retained by the authority seizing the document. However, documents can be retained so long as the document would remain relevant or useful to the investigation or proceedings, meaning thereby, that the custody would become co-terminus with the conclusion of the concerned investigation or proceedings.

Counsel for the petitioner has relied on the decision of the Apex Court in Directorate of Enforcement Vs. Ashok Kumar Jain, . Their Lordships of the Apex Court has considered the provision of Section 41 of the FERA. Section 38 was not involved in Ashok Kumar Jain's case (supra). The Apex Court has extended the period even u/s 41 by six months so that public interest should not suffer by not utilization of the seized documents in interrogating the respondents. The decision of the Apex Court is distinguishable. In the instant case proceedings have been initiated as per memo P/1 and the petitioner was required to show-cause for violation of Section 8 of FERA and why adjudication proceedings u/s 51 of FERA should not be held and foreign exchange US \$ 19,500 and Rs. 400 be not confiscated u/s 63. P/2 is yet another notice for adjudication proceedings. Petitioner was informed as per P/2 that proceedings u/s 51 of FREA are to be held against the petitioner in accordance with the procedure laid down in Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 and fixed the case on 19-7-2001 and another notice P/8 was sent for personal hearing on 3-8-2001. But, the petitioner has not attended even a single hearing before the Assistant Director, Enforcement Directorate, Agra office.

The petitioner was served with a preliminary notice to show-cause on 18-8-1999

and attention was invited to provision under Rule 3 of Adjudication Proceedings and Appeal Rules, 1974. Petitioner was also informed by subsequent notices P/2 and P/8 of the proceedings under Rule 3 of Adjudication Proceedings and Appeal Rules, 1974, but he has not attended the hearing.

In *N. Sreenivasan v. Director of Enforcement* MR 1973 Ker. 249, similar provision of Foreign Exchange Regulations Act, 1947 came for consideration. It was held considering the Adjudicating Proceedings and Appeal Rules, 1957, Rule 3, it has been held that issuance of notice u/s 23D of the Act as provided in Rule 3 is sufficient to commencement of the proceedings within the meaning of Section 19G of FERA. Reliance was placed on decision of Bombay High Court in *Eastern Machinery Trading Co. Vs. State*, . It has been held the preliminary notice is part of the adjudicatory machinery and the issuance of the notice amounts to the commencement of the proceedings. Pursuant to such a notice it has to be decided whether adjudication proceedings should be held and if so to fix the time and place for the appearance of the persons concerned. That is only a later stage of the proceedings which have been commenced by the issuance of the notice under Rule 3(1) of the rules of 1957. In *Eastern Machinery Trading Co.* 's case (supra), the High Court of Bombay has held after issue of show-cause notice in respect of offence under FERA, the retention of the documents seized automatically stands extended.

In *Abdul Kader Mahomed Jhaveri Vs. Union of India and Others*, , it was held that if seizure is u/s 38 limitation prescribed u/s 41 is not applicable, however, documents could not be retained for indefinite period.

In *Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others*, , the Apex Court has held that provision of Section 165(1) is not incorporated in Section 37(2) of FERA and until unless search and seizure is illegal, return of seized documents/articles cannot be ordered.

In view of the above discussion, it is clear that seizure is u/s 38 of FERA for which no limitation is prescribed as to the period of seizure and proceedings have been commenced with a preliminary notice issued on 18-8-1999. Petitioner's attention was invited under Rule 3 of the Adjudication of Proceedings and Appeal Rules, 1974. Thus proceedings have commenced with preliminary notice and once proceedings have commenced until unless proceedings are concluded documents can be retained so long as they are required, till the proceedings are over. However, as the petitioner has not co-operated pursuant to memo P/1, notices P/2 and P/8 and has not attended even a single hearing, it is not open to the petitioner to contend that the documents are being retained for long period due to fault of respondents. Petitioner has to attend to the hearing as ordered by the C.J.M. and seek adjudication. Respondent No. 3 is expected to decide the proceedings as expeditiously as possible.

Resultantly, writ petition is sansmerit and is dismissed. No order as to costs.